

1  
2  
3  
4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**  
6

7 JOHN DAVID HUNT,

8 Plaintiff,

9 vs.

10 TOM M. HARPER, II,

11 Defendant.  
12

3:17-cv-00165-RJC-WGC

**ORDER**

13 This is a diversity case for negligence arising from an alleged incident of road rage. Now  
14 pending before the Court is a Motion to Dismiss. (ECF No. 5.)

15 **I. FACTS AND PROCEDURAL BACKGROUND**

16 On November 4, 2014, Plaintiff John Hunt filed a complaint against Defendant Tom  
17 Harper in the Second Judicial District of the State of Nevada, Washoe County. (State Court  
18 Complaint, ECF No. 6-3.) The complaint alleged one cause of action for negligence based on an  
19 altercation between the parties on March 3, 2013. While driving on Veterans Parkway in south  
20 Reno, Plaintiff alleges he approached Defendant's vehicle from behind, which was moving at  
21 approximately 20 to 25 miles per hour in the left-hand lane despite a posted a speed limit of 45.  
22 (*Id.* at ¶ 8.) When Plaintiff tried to pass Defendant on the right side, Defendant "swerved  
23 abruptly" in front of Plaintiff's vehicle. (*Id.* at ¶ 9.) Further down the road, while Plaintiff was  
24 stopped at a stop sign, Defendant got out of his car and "rapidly approached" Plaintiff's vehicle.

1 (*Id.* at ¶¶ 10–11.) Having seen Defendant coming toward him, Plaintiff began to exit his vehicle,  
2 at which time a “scuffle” ensued between the two men. (*Id.* at ¶¶ 11–12.) During the scuffle,  
3 Plaintiff sustained a broken ankle, head trauma, facial bruising, and multiple lacerations. (*Id.* at  
4 ¶¶ 12–14.) Plaintiff also developed an infection while in the hospital for treatment, and  
5 altogether incurred medical expenses in excess of \$540,000. (*Id.* at ¶ 15.)

6 On February 26, 2016, the state court dismissed Plaintiff’s complaint under Nevada Rule  
7 of Civil Procedure 4(i), for failure to serve Defendant within 120 days following a court order  
8 extending the time for service. (Dismissal Order 2, ECF No. 6-8.) Subsequently, on March 16,  
9 2017, Plaintiff filed a virtually identical complaint in this Court. (Compl., ECF No. 1.) Defendant  
10 now moves to dismiss the Complaint with prejudice under the Full Faith and Credit Act, arguing  
11 that the instant action is wholly precluded by the state court’s prior dismissal of the same claim,  
12 based on the same facts, asserted by and against the same parties.

## 13 **II. LEGAL STANDARDS**

14 “It is now settled that a federal court must give to a state-court judgment the same  
15 preclusive effect as would be given that judgment under the law of the state in which the  
16 judgment was rendered.” *Ross v. Alaska*, 189 F.3d 1107, 1110 (9th Cir. 1999) (quoting *Migra v.*  
17 *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984)). The Nevada Supreme Court  
18 requires that three elements be met for claim preclusion to apply:

19 (1) the final judgment is valid, (2) the subsequent action is based on the same  
20 claims or any part of them that were or could have been brought in the first case,  
21 and (3) the parties or their privies are the same in the instant lawsuit as they were  
22 in the previous lawsuit, or the defendant can demonstrate that he or she should  
have been included as a defendant in the earlier suit and the plaintiff fails to  
provide a ‘good reason’ for not having done so.

23 *Weddell v. Sharp*, 131 Nev. Adv. Op. 28, 350 P.3d 80, 85 (2015), reh’g denied (July 23, 2015)  
24 (citations and punctuation omitted). However, “[w]hile the requirement of a valid final judgment

1 does not necessarily require a determination on the merits, *it does not include a case that was*  
2 *dismissed without prejudice* or for some reason (jurisdiction, venue, failure to join a party) that is  
3 not meant to have preclusive effect.” *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194  
4 P.3d 709, 713 n.27 (2008) (emphasis added).

### 5 **III. ANALYSIS**

6 Here, the state court’s dismissal of Plaintiff’s initial complaint was without prejudice, and  
7 thus not intended to be given preclusive effect. It is clear the state court dismissed the case based  
8 solely on Rule 4(i), which provides: “If a service of the summons and complaint is not made  
9 upon a defendant within 120 days after the filing of the complaint, *the action shall be dismissed*  
10 *as to that defendant without prejudice* upon the court’s own initiative with notice to such party or  
11 upon motion . . . .” Nev. R. Civ. Proc. 4(i) (emphasis added). Notwithstanding, Defendant argues  
12 that this Court should consider the state court’s dismissal to have been with prejudice based on  
13 Rule 41(b), which states that unless a dismissal order “otherwise specifies,” any involuntary  
14 dismissal “other than . . . for lack of jurisdiction, for improper venue, or for failure to join a party  
15 under Rule 19, operates as an adjudication upon the merits.” Nev. R. Civ. Proc. 41(b).

16 However, this argument ignores the express and obligatory language of Rule 4(i). The  
17 fact is that any dismissal based solely on Rule 4(i) is necessarily a dismissal without prejudice.  
18 The general provisions of Rule 41(b) do not change that fact. *See In re Resort at Summerlin*  
19 *Litig.*, 122 Nev. 177, 185, 127 P.3d 1076, 1081 (Nev. 2006) (“Importantly, where a general  
20 statutory provision and a specific one cover the same subject matter, the specific provision  
21 controls.”). Furthermore, by stating in its order that the dismissal was based on Rule 4(i), the  
22 state court sufficiently “otherwise specified” for purposes of Rule 41(b). Lastly, it bears noting  
23 that Defendant’s own state-court motion to dismiss sought only dismissal *without prejudice*. (*See*  
24 *Mot. Dismiss 1–5, ECF No. 6–6* (“Defendant . . . hereby moves to dismiss without prejudice . . . .

1 [T]he Court should dismiss without prejudice the Complaint . . . .”).) Despite his prior correct  
2 understanding, Defendant now attempts, after the fact, to transform the state court’s dismissal  
3 into something it is not.

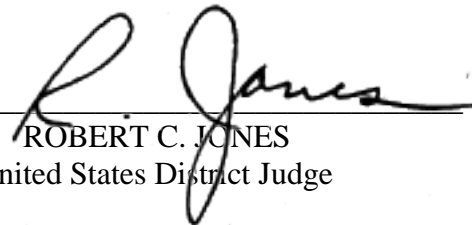
4 Because the state court dismissed Plaintiff’s action under Rule 4(i), the dismissal was  
5 without prejudice. By definition, a dismissal without prejudice is not preclusive. Therefore, the  
6 dismissal did not prevent Plaintiff from subsequently filing an identical complaint in the same  
7 court, much less this one.

8 **CONCLUSION**

9 IT IS HEREBY ORDERED that the Motion to Dismiss (ECF No. 5) is DENIED.

10 IT IS SO ORDERED.

11 DATED: This 23<sup>rd</sup> day of May, 2017.

12   
13 \_\_\_\_\_  
14 ROBERT C. JONES  
15 United States District Judge  
16  
17  
18  
19  
20  
21  
22  
23  
24